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No. 06-134

IN THE

Supreme Court of the United States

THE PERMANENT MISSION OF INDIA TO THE UNITED NATIONS and THE PERMANENT REPRESENTATIVE OF MONGOLIA TO THE UNITED NATIONS,

Petitioners,

v.

THE CITY OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Does the exception to foreign sovereign immunity for cases "in which . . . rights in immovable property situated in the United States are in issue," 28 U.S.C. § 1605(a)(4), provide jurisdiction for a municipality's lawsuit seeking a judgment establishing the validity of a property tax lien on a foreign sovereign's realty?

2. Is it appropriate for United States courts, when interpreting the Foreign Sovereign Immunities Act, to consider international treaties that, while not ratified by the United States, may nonetheless be relevant to establish the customary international law of foreign sovereign immunity contemporaneous with the adoption of the Act?

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STATEMENT OF THE CASE

The Permanent Mission of India to the United Nations ("India") and the Permanent Representative of Mongolia to the United Nations ("Mongolia") (collectively referred to as "petitioners") each own and operate multi-story properties in midtown Manhattan in New York City. The upper twenty floors of India's building are devoted exclusively to housing for staff of India's Permanent Mission to the United Nations and of the Indian consulate in New York. All of these staff — including attaches, first and second secretaries, counselors and chauffeurs — are below the level of head of mission (JA97-101). The top three floors of Mongolia's building are devoted exclusively to housing for staff of Mongolia's Permanent Mission to the United Nations. They, too, are below the level of head of mission, and include attaches, first, second and third secretaries, administrative officers and drivers (JA156-157). The remaining floors of each building are used as offices of petitioners' United Nations missions, and in Mongolia's case, as the ambassador's residence, and are concededly exempt from local taxation.

When India first occupied its premises, in 1993, the United States Mission to the United Nations informed India that only the portion of its building that housed the Permanent Mission itself and the residences of the Permanent Representative or the Consul General were tax exempt. In a Diplomatic Note, the United States advised India (U.S. Dept. of State, HC-06-93, February 17, 1993, JA181-182) (emphasis added).

> The Mission is reminded that exemption from property taxes is available only for that portion of the building used to house the Permanent Mission, which the United States Mission understands will occupy the first four floors of the building, and the residences of the Permanent Representative and the Consul General. *The remainder of the building . . . will be subject to New York City property taxes.*

Also in 1993, the State Department issued a Diplomatic Note to all countries' missions to the United Nations reminding them of their obligation to pay local real estate tax on properties used for staff housing in the New York metropolitan area. U.S. Dept. of State, Diplomatic Note HC-18-93, April 14, 1993 (JA187).

In 2001, the State Department, citing the 1961 Vienna Convention on Diplomatic Relations, 23 U.S.T. 3227 (U.S.T. 1961), in force, 1972 (the "Vienna Convention") and the 1963 Vienna Convention on Consular Relations, 21 U.S.T. 77, Art 32 (U.S.T. 1969), in force, 1969 (collectively, the "Vienna Conventions"), issued another Diplomatic Note reiterating the obligations of all missions to the United Nations to pay local real estate tax on properties used for staff housing. U.S. Dept. of State, Diplomatic Note HC-12-01, April 5, 2001 (JA189-91).[1]

As recently as 2004, subsequent to the commencement of the suits at bar, the State Department advised all foreign governments (U.S. Dept. of State, Guidance for Administrative Officers § 7.8, January 4, 2004 (JA177):

> Absent a bilateral agreement, property tax exemption is not generally granted to residences owned by foreign governments used to house members of consular posts or international organizations, except . . . for career

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[1] The Diplomatic Note stated:

> The government- or mission-owned residence of any individual at the Permanent Mission with the title of Ambassador or Minister Plenipotentiary . . . is also exempt from property tax under New York Real Property Tax Law [§] 418. The residence of the Chief of Mission of a consular post enjoys tax exemption under the Vienna Convention on Consular Relations. *All other residential property owned by the Permanent Mission or the sending state and occupied by a diplomat or mission member of lesser rank is subject to property tax . . . .*

(Emphasis added.)

> heads of the consular posts or chiefs of missions to the international organizations.[2]

As reflected by the State Department's present website, this remains the State Department's position today.[3]

The City of New York (the "City") assessed real property taxes, as well as sidewalk repair and elevator charges (JA74-75), on the residential portions of petitioners' properties, excluding the portion of Mongolia's property occupied by its ambassador to the United Nations. Those taxes have not been paid. As of January 31, 2003, India owed $16,376,702.09 (JA19, 29), and Mongolia owed $2,068.995.00 (JA41, 44). These amounts continue to grow through the imposition of interest charges and additional yearly tax assessments.

In New York City, unpaid real property taxes become liens on the property:

> All taxes and all assessments and all sewer rents, sewer surcharges and water rents, and the interest and charges thereon, which may be laid or may have heretofore been laid, upon New York real estate now in the city, shall continue to be, until paid, a lien thereon, and shall be preferred in payment to all other charges.

N.Y.C. Administrative Code § 11-301.

These actions, brought in state court and removed to federal court, were commenced pursuant to N.Y.C. Administrative Code § 11-354, which authorizes foreclosure of tax liens, and

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[2] In contrast to its treatment of the United Nations' missions, the State Department has, with applicability only to embassies and consulates within the Washington, D.C. metropolitan area, extended real property tax exemptions to include premises used to house diplomatic staff, subject to reciprocal treatment of similar United States-owned property in foreign capitals (JA177).

[3] *See* http://www.state.gov/documents /organization/27910.pdf. (labeled by the State Department website as "reviewed/updated 3/27/06") (last reviewed 3/29/07).

§ 11-338, under which "the plaintiff shall be entitled to a judgment establishing the validity of the tax lien so far as the same shall not be adjudged invalid." The City recognizes that it cannot foreclose against the present owners.

Petitioners' motions to dismiss the complaints for lack of subject matter jurisdiction were denied by the District Court, Pet. App. 25, *City of New York v. Permanent Mission of India to the United Nations,* 376 F.Supp.2d 429, 439 (S.D.N.Y. 2005) (Casey, J.), which ruled it had jurisdiction under the immovable property exception of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(4). The Court based its conclusion upon "[t]he international practice that the immovable property exception codifies and the legislative history of the FSIA," and on the fact that "the tax liens place [petitioners'] and the City's rights in the properties in issue." Pet. App. 44, 376 F.Supp.2d at 439. The District Court noted that the FSIA's immovable property exception recognized "what is understood in domestic property jurisprudence to be the 'local action rule,'" requiring that the determination of rights in real property be judicially determined by the jurisdiction in which it is sited. Pet. App. 36, 376 F.Supp.2d at 434.

The United States Court of Appeals for the Second Circuit unanimously affirmed. Pet. App. 1, *City of New York v. Permanent Mission of India to the United Nations*, 446 F.3d 365 (2d Cir. 2006). Judge Katzmann's opinion noted that the court had "carefully considered . . . the United States' arguments sounding in public policy" — whose views it had requested — and found them "not presently to justify a dismissal on foreign policy grounds." Pet. App. 22 n. 17, 446 F.3d at 377 n. 16. Like the District Court, the Court of Appeals did not reach the City's alternate contention that jurisdiction could also be found under the commercial activity exception of 28 U.S.C. § 1605(a)(2).

Whether the properties at issue are subject to taxation turns primarily on interpretation of the Vienna Convention. The City asserts that the properties are taxable because the Convention,

as well as New York Real Property Tax L. § 418(1), exempt from taxation only the mission, the consulate, and the residences of the chief of mission and of the consul general, and not staff housing. Petitioners, in contrast, read the Vienna Convention as exempting staff housing as well (Pet. Br. 3-4, 30).

SUMMARY OF ARGUMENT

1. The courts have jurisdiction to adjudicate the validity of the tax liens at issue under 28 U.S.C. § 1605(a)(4), which provides for jurisdiction when "rights in immovable property . . . are in issue." The statute's plain language does not limit this immunity exception to disputes over only certain types of rights in immovable property.

2. Courts have consistently held that liens, including tax liens, are rights the lien holder has in the property of the owner. A tax lien also puts in issue the fee owner's title and right to possession. This suit over the liens' validity therefore puts in issue both petitioners' and respondent's rights in immovable property. The legislative history of the FSIA, on which petitioners and the United States rely, makes clear that the immovable property exception was intended to cover questions of "ownership, rent, servitudes and similar matters," which phrase encompasses liens. The local action rule, whose principles underlie the immovable property exception, provides that rights in real property, including liens, are properly adjudicated only by the courts where the property is located.

3. Contrary to the arguments of petitioners and the United States, the property tax liens at issue here are not a "bootstrapping" device comparable to a pre-judgment attachment that the City has created as an artifice to obtain personal jurisdiction over petitioners in some unrelated dispute. Rather, they create rights in the City and impair the rights of petitioners in the same way as would be the case regardless of who owns the property. These rights give rise to subject matter jurisdiction here.

4. The FSIA codifies the restrictive view of foreign sovereign immunity in international law. International law, as summarized in the Second and Third Restatements of Foreign Relations Law, and as expressed by foreign and domestic case law, commentators and international conventions, recognizes that jurisdiction under the restrictive view extends to disputes concerning mortgages and liens.

5. With the exception of *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3rd Cir. 1985), United States case law, including *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984), has indicated that the rights referred to in § 1605(a)(4) extend to all rights that affect title.

6. According to petitioners and the United States, the FSIA is to be interpreted in light of the Vienna Conventions. Those Conventions, as is made clear by consistent interpretations of the State Department, including statements appearing on the State Department's website today, permit taxation of the property at issue here. The Vienna Convention's provisions concerning the jurisdictional immunity of diplomatic agents would not bar jurisdiction in a case involving diplomatic staff housing, even if the owners were diplomatic agents, much less when, as here, the owners are the sovereigns themselves.

7. That the FSIA would prohibit execution of any judgment here is irrelevant, since the basic structure of the FSIA contemplates jurisdiction even in the absence of a right to execute. It is a truism of the law of foreign sovereign immunity that there can be adjudication without enforcement, and that foreign sovereigns obey the judgments of impartial courts. Recent Appropriations Acts provide for deduction from foreign aid for those countries that fail to pay judgments, giving additional incentive to foreign governments to comply with any judgment that might be rendered. Relegating enforcement of respondent's rights to diplomacy would be contrary to the purpose of the FSIA, and would render substantially meaningless those Appropriations Acts.

8. The courts also have jurisdiction to adjudicate these proceedings under the commercial activity exception of 28 U.S.C. § 1605(a)(2). That exception applies when the foreign government, regardless of its purpose, "acts, not as regulator of a market, but in the manner of a private player within it." *Republic of Argentina v. Weltover*, 504 U.S. 607, 614 (1992). Providing housing to employees, the activity giving rise to this dispute, is not unique to diplomacy or the exercise of sovereignty, but can be engaged in by private citizens as well. *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

ARGUMENT

I. THE COURTS OF THE UNITED STATES HAVE JURISDICTION OF THIS DISPUTE UNDER THE "RIGHTS IN IMMOVABLE PROPERTY" EXCEPTION TO THE FSIA.

A. THE LANGUAGE OF THE STATUTE SUPPORTS JURISDICTION FOR SUITS TO RECOGNIZE PROPERTY TAX LIENS.

Section 1605(a)(4) of the FSIA provides: "A foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case in which . . . rights in immovable property situated in the United States are in issue." Throughout their briefs, petitioners and the United States repeat that "the provision confers jurisdiction over disputes regarding rights in the property itself, such as title, easements, or possession," yet argue, without any support in the statutory language, that a tax lien, which if valid could lead both to title in and possession of the property by the lien holder, is not a right in property (*e.g.*, Pet. Br. at 15; U.S. Br. at 6, 7, 18, 21, 22). But as the court below noted, the statute

> certainly does not specifically exclude cases in which the right at issue is a lien. Nor does the plain language restrict this provision to cases where the *foreign government's* rights in the property are in issue . . . ;

> a purely textual analysis suggests that it would suffice that the City's rights in the property (which are simply the flip side of the defendants' obligations with respect to the property) are in dispute.

Pet. App. at 8; 446 F.3d at 369 (emphasis in original).

As with any question of statutory interpretation, the language of the statute is paramount. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). This case is not, as petitioners would have it, a "tax enforcement lawsuit," Pet. Br. at 23, 28, but rather an action seeking "a judgment establishing the validity" of a property tax lien (JA25, 40). By seeking such a declaration this action places in issue both respondent's and petitioners' rights in property. Whether or not petitioners' underlying tax obligations are, in the language of the Second Circuit opinion, "an obligation arising out of the use of the property," Pet. App. 17-18, 446 F.3d at 374, is irrelevant to the Court's inquiry into whether or not a property tax lien is a right in property, and petitioners' attack on that language is beside the point.

1. The City's Rights in Petitioners' Properties are In Issue.

By definition, a property tax lien is a right that the lien holder has in the property of the fee owner. Black's Law Dictionary 941 (8th ed. 1999) (lien defined as "legal right or interest that a creditor has in another's property").[4] This Court has described a lien as "a property in the thing," *The J.E. Rumbell*, 148 U.S. 1, 10 (1893), and as a "right [that] may be just as absolute and just as essential to the interests of the claimant as the right of property in the thing itself, and . . . in fact, a species of property in the thing." *Marshall v. Knox*, 83 U.S. 551, 557 (1872). *See United States v. Security Industrial*

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[4] *See also* 51 Am. Jur. 2d, Liens § 1 (2003) (lien defined as "a qualified right of property that a creditor has in or over specific property"); M. Mitzner, *Liens and Encumbrance* in Pedowitz, *Real Estate Titles* § 9.0 (1984) (liens "consist of a right to or an interest in land").

Bank, 459 U.S. 70, 76 (1982) ("[t]he 'bundle of rights' which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple, but . . . no cases support the proposition that differences such as these relegate the secured party's interest to something less than property").

In various contexts, liens have been held to be rights in the property to which they attach.[5] Those property rights are created and defined by state law. *Butner v. United States*, 440 U.S. 48, 55 (1979).[6] Under New York law, a lien on realty is defined as "a possessory right in the encumbered property with a concomitant right to sell that property if the debt is not satisfied."

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[5] *See Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983) (mortgagee has "a substantial property interest" that entitles it to notice consistent with Fourteenth Amendment due process requirements); *Security Industrial Bank*, 459 U.S. at 77 (statute invalidating liens is unconstitutional taking); *First State Bank-Keene v. Metroplex Petroleum Inc.*, 155 F.3d 732, 739 (5th Cir. 1998) (mortgage lien creates equitable rights in property); *Armstrong v. United States*, 364 U.S. 40, 44, 48 (1960) (extinguishing of lien is unconstitutional taking); *Cavalier County v. Gestson*, 31 N.W.2d 787, 792 (N.D. 1948) (lien is "right of property" for purposes of local action rule); *Haebler v. Myers*, 30 N.E. 963, 965 (N.Y. 1892) ("lien is property in the broad sense of the word"). *Cf. Pasquantino v. United States*, 544 U.S. 349, 356-57 (2005) (a government's right to revenue obtained from taxation is property); *Matagorda County v. Law*, 19 F.3d 215, 224 (5th Cir. 1994) (property interest may include taxes due as well as tax lien). *See also Reference re Tax on Foreign Legations*, 2 D.L.R. 481, 500 (Sup. Ct. of Canada, 1943) (enforcement of tax lien is "assertion of 'a right . . . over the property of a foreign sovereign'").

[6] This Court has recognized the value of incorporating state law into federal bankruptcy statutes in order that property interests, including security interests, are treated uniformly within each state, even where this would lead to different outcomes in different states. *Butner*, 440 U.S. at 54-55. Similarly, in enacting the FSIA, Congress sought to achieve results governed by application of state law legal principles governing "rights in property." There is no evidence that Congress sought a uniformity of outcomes in situations where state property law might provide otherwise.

75 N.Y. Jur.2d, Liens § 5, at 138 (2000). *See Travis v. Sheriff of Cortland Co.*, 90 N.Y.S.2d 848 (N.Y. App. Div. 1949) (holder of a lien has a "special property interest in the object of his lien"). In New York, contrary to the contentions of petitioners and the United States, a lienor is, by statute, a condemnee and a necessary party in condemnation proceedings. New York Em. Dom. Proc. L. §§ 103, 505 (2007).[7] New York City property tax liens are perpetual in duration, and may be sold or assigned. New York City Charter § 1519(2); N.Y.C. Admin. Code §§ 11-301 to 11-329, 11-332, 11-333. Like all liens, they run with the land. 5 Powell, Law of Real Property § 39.04[2] (2004).

Because a lien is a right the lien holder has in the fee owner's property, it follows that an action to declare whether or not the lien is valid places the lien holder's rights in that property in issue.

Petitioners and the United States rely on the ancient formalism that a judgment lien is "no property or right in the land itself" (*e.g.* U.S. Br. at 21-22). Even the source they cite, however, questions the meaning and accuracy of this formulation 5 H.T. Tiffany, The Law of Real Property § 1581 (3d ed. 1939):

> The exact significance of the statement that the [judgment] lien does not involve any property or right in the land is not entirely clear. . . . The lien of a judgment differs from other liens, however, in that it attaches not to any specific land, but to all the land owned by the debtor. . . . And it would seem that it is this general nature of the judgment lien, rather than

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[7] *Weinstein v. Taylor*, 234 N.Y.S.2d 926 (N.Y. S. Ct. 1962), *aff'd* 242 N.Y.S.2d 707 (N.Y. App. Div. 1963), cited by petitioners and the United States (Pet. Br. at 34; U.S. Br. at 21), has been superseded by statute. *See L-C Security Service Corp. v. State*, 434 N.Y.S.2d 883, 884-85 (N.Y. Ct. Cl. 1980) ("Chapter 40 of the Laws of 1977 . . . amended section 9 of the Court of Claims Act to provide that a real property tax lien was an interest in real property for purposes of filing an appropriation claim").

> the fact that it does not involve any proprietary right in the land, that serves to distinguish it from other liens.[8]

The cases cited by petitioners and the United States do not support their argument because the distinction this formalism highlights is irrelevant to the FSIA's concerns. As the United States agrees, § 1605(a)(4) embodies the United States' sovereign interest in controlling its own land. However, contrary to the contention of the United States, the recognition of liens is indeed "at the heart of the domestic sovereign's 'primeval interest in resolving disputes over use or right to use of real property within its own domain,'" because liens affect title (*cf.* U.S. Br. at 24, citing *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d at 1517, 1521 (D.C. Cir. 1984). Thus, in a very real and practical sense, they are rights in property.

Courts have recognized this in a closely related context where the same interest is at stake, *i.e.*, in actions to clear clouds on title. In that context, they have rejected the contention that a lien is not a right in property within the meaning of statutes to quiet title. *Ormsby v. Ottman*, 85 F. 492, 495-96 (8th Cir. 1898) (noting that whether or not a lien is a right in property depends on the purpose and context of the statute); *Clark v. Darlington*, 63 N.W. 771, 772 (S.D. 1895).[9] *See*, in context of action to remove tax lien, *United States v. Alabama*, 313 U.S. 274, 281-82 (1941) (even though a local property tax lien could not be

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[8] The United States also claims, citing this same section of Tiffany § 1559, that "[e]arly common law did not even recognize a lien on land." U.S. Br. at 22. However, as that section states, liens on land have been recognized as equitable rights since the Statute of Westminster II in 1285.

[9] In contrast to the cases cited above, none of the cases cited by petitioners and the United States are in contexts that are relevant here. In *Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261 (1999), the court rejected plaintiff's argument that a statute waiving U.S. sovereign immunity for injunctive claims applied to equitable liens on U.S. Army funds. In *In re Oyster Bay Cove, Ltd.*, 161 B.R. 338, 343 (Bankr. E.D.N.Y. 1994), *aff'd*, 196 B.R. 251 (E.D.N.Y. 1996), the court held that where the terms of a bankruptcy sale explicitly preserved non-

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enforced against land owned by the United States, the Court adjudicated the lien's validity because it would affect title and ability to sell the land).

Petitioners and the United States rely on legislative history in support of their narrow reading of the meaning of "rights in property." The passage contained in the legislative history to which they point (Pet. Br. at 33; U.S. Br. at 22-24) states that "a foreign state cannot deny to the local state the right to adjudicate questions of ownership, rent, servitudes and similar matters, as long as the foreign state's possession of the premises is not disturbed." House Report No. 1487, 94th Cong., 2d Sess., at 20-21, reprinted in 1976 U.S. Code Cong. & Ad. News ("U.S.C.C.A.N.") 6604, at 6618-19 ("House Report"). This passage, they argue, compels the conclusion that liens are not among the rights encompassed within § 1605(a)(4), because unlike a claim to title or possession or for enforcement of a servitude, "[t]he lien . . . does not amount to an interest in the real property itself." This argument overlooks the essence of what a lien is. Not only do liens implicate ownership and

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monetary restrictions, such a restriction survived even though the sale was free and clear of "all liens, claims, encumbrances and rights of others of whatever kind." *Ward v. Chamberlain*, 67 U.S. 430, 437 (1862), held that a judgment in admiralty could be enforced through a lien on lands. The Court's statement that "a lien constitutes no property or right in the land" was preceded by the word "Although," and was in any event *dictum*. *Massingill v. Downs*, 48 U.S. 760, 767 (1849), concerned whether a lien on slaves, although not recorded, was nevertheless valid. Again, the formalistic recitation is *dictum*. In *Conard v. The Atlantic Insurance Co.*, 26 U.S. 386, 443 (1828), the Court explained that liens were different from estates in property in that they only gave the lien holder the right to levy on the property of the debtor, not the right to pursue the proceeds in the hands of the vendor. *Marine Midland Bank v. Marcal Enterprises*, 398 N.Y.S.2d 782 (N.Y. Co. Ct. 1977), and *Bertie's Apple Valley Farms v. United States*, 476 F.2d 291 (9th Cir. 1973), both construe statutes that explicitly distinguish between various interests in real property.

possession, but in many respects they are similar to servitudes. The District Court observed that both are encumbrances, both are defined as "charges" on property, both run with the land, and both "directly affect the property owner's rights to alienate." Pet App. at 37, 476 F.Supp.2d at 436; *see also* M. Mitzner, *Liens and Encumbrances* § 9.0.

Petitioners' interpretation of the House Report as excluding liens, said the Second Circuit, "has no corollary in the text actually adopted by Congress, which imposes no such limitations on the types of property rights that permit jurisdiction." Pet. App.11 n. 7; 446 F.3d at 371 n.6. *See also* House Report at 20, U.S.C.C.A.N. at 6618 ("Section 1605(a)(4) denies sovereign immunity in litigation relating to rights in real estate").

The United States itself explained, in its *amicus curiae* submission in support of reargument in *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31 (3d Cir. 1985), why, in interpreting the FSIA, a lien must be viewed as similar to a servitude:

> An action relating to a servitude would not, generally, deprive the land owner of title or possession . . . Thus, the Court's interpretation of Section 1605(a)(4), if read literally, would deny jurisdiction in cases which Congress explicitly had intended to make justiciable, and would render the phrase "servitudes and similar matters" largely a nullity. . . . [T]ax liens have as much a relationship to "title" or "possession" as do rents and servitudes, and, in any event, are encompassed within "similar matters."

U.S. *Amicus* Br. in *City of Englewood* at 7; *see also id.* at 10 ("As a Matter of Property Law, Disputes Which Involve Tax Liens Involve Rights In Immovable Property").

2. Petitioners' Rights in the Properties Are Also In Issue.

This action places in issue not only the rights of the lien holder in the fee owners' properties, but equally the rights of

the fee owners themselves to unburdened ownership and possession. As the District Court wrote, "the presence of a tax lien means that the owner does not have the power to convey full rights and title to another purchaser. . . . [A] suit adjudicating the validity of such lien therefore puts in issue the owner's rights in that property." Pet. App at 30; 376 F.Supp.2d at 435-36.

The ordinary lien foreclosure action places ownership and possession directly and immediately in issue, because it causes the fee owner to lose both title and possession. The immunity of petitioners' properties from attachment and execution does not alter the fact that, as in cases brought to quiet title, petitioners' rights in their property are in issue (*See supra* at pp. 11-12). An outstanding lien affects title by rendering it unmarketable. Warren's Weed New York Real Property § 91.34 (4th ed. 2002). A tax lien on a foreign government's property has "an immediate adverse effect upon the amount which the [foreign] government would receive on a sale," and "constitute[s] a direct interference with the property of a foreign state." *Republic of Argentina v. City of New York*, 250 N.E.2d 698 (N.Y. 1969).[10] If not discharged, the liens will not only reduce the amount the foreign sovereign property owner will realize when it sells the property, but will ultimately serve to divest the eventual non-diplomatic title-holder of both title and possession.

Nothing in the language of § 1605(a)(4) states that to fit within the immovable property exception a claim must seek immediately to divest the fee owner of ownership or possession, as argued by petitioners and the United States. The question of whether rights are in issue therefore cannot turn on the fortuity that enforcement of those rights by execution or attachment is

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[10] Other courts have also held that liens have a substantial effect on the rights of the fee owner. *See, e.g., Southwest Land Inv. v. Hubbart*, 867 P.2d 412 (N.M. 1993); *Zaccaro v. Cahill*, 800 N.E.2d 1096 (N.Y. 2003) (tax liens "substantially affect the rights of property owners"); *L.K. Land Corp. v Gordon*, 136 N.E.2d 500 (N.Y. 1956).

prohibited by the FSIA. Indeed, were that the case, no claim under § 1605(a)(4) could ever be enforced, because even a successful claimant under that section would be barred by the foreign sovereign's immunity from attachment and execution guaranteed by 28 U.S.C. §§ 1609-1610. Petitioners' and the United States' interpretation of the exception would therefore render it a nullity.

3. *Section 1605(a)(4) Embodies the Rule that the Jurisdiction of the Situs Has Control Over Property Within its Territorial Limits.*

This Court has long recognized that a State "has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto." *Arndt v. Griggs*, 134 U.S. 316, 320-21 (1890); *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977) ("'every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory.'") (*quoting Pennoyer v. Neff*, 95 U.S. 714 [1878]); *Huling v. Kaw Valley Railway*, 130 U.S. 559, 564 (1889) (non-resident owner "cannot evade the duties and obligations [including tax obligations] which the law imposes on him in regard to [real] property by his absence from the State"). This policy underlies the jurisprudence that provides for relaxed means of obtaining personal jurisdiction in actions to clear clouds on title to property, including liens, as well as the local action rule.

Congress' recognition of the need to facilitate the courts' exercise of jurisdiction over rights in property, specifically including liens and suits involving clouds on title, is reflected in 28 U.S.C. § 1655, titled "Lien enforcement; absent defendants."[11] The immovable property exception codifies, with

[11] *See also Shaffer v. Heitner*, 433 U.S. at 207 (when "claims to the property itself are the source of the underlying controversy," as opposed to the property being merely the means to bring a defendant

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respect to foreign sovereigns, this same policy interest, *i.e.*, the United States' interest in controlling its own land. *See Asociacion de Reclamantes v. United Mexican States*, 735 F.2d at 1521.

Reclamantes, which discussed § 1605(a)(4) at length, noted that the policies underlying the local action rule were similar to those underlying this "traditional real property exception," and that the contours of the exception complemented the local action rule, which makes the local court the exclusive venue for actions involving real property. 735 F.2d at 1521-22. Under the local action rule, and contrary to the contention of the United States, actions to enforce liens, or to seek a declaration of their validity, are traditionally local, and must be heard where the property is located.[12]

Reclamantes suggests that if a case determining the validity of an interest in real property is subject to the local action rule, it also fits within the FSIA's immovable property exception. "The [local action rule], like [the exception to foreign sovereign immunity], is limited to questions that directly implicate interests in the property or rights to possession." 735 F.2d at 1522. Similar considerations underlie both rules: the fact that a sovereign has "a primeval interest in resolving all disputes over use or right to use of real property within its own domain," *id.* at 1521, and

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into court via a pre-judgment attachment in an unrelated dispute, minimum contacts required by due process will ordinarily be found to exist); 1 Moore's Federal Practice § 4.02 (3d ed. 2006).

[12] Actions to enforce: *e.g. Robertson v. Chinnow*, 68 N.W.2d 909, 911 (1955); *Edward Joy Co., Inc. v. McGuire & Bennett, Inc.*, 608 N.Y.S.2d 134 (N.Y. App. Div. 1993); *Merrill Realty Co., Inc. v. Harris*, 353 N.Y.S.2d 570 (N.Y. App. Div. 1974); *see also* 56 Am. Jur. Venue, § 11, 1954 Supp.; J. V. Dempsey, Lien as Estate or Interest in Land Within Venue Statute, 2 A.L.R. 2d 1261 (1948). Actions for declaration of validity: *e.g. Cavalier County v. Gestson*, 31 N.W.2d at 790; *Honoye Central School Dist. v. Berle*, 415 N.Y.S.2d 565 (N.Y.S. Ct. 1979); *McClatchie v. Rector, Church Wardens & Vestrymen*, 118 N.Y.S.2d 648 (N.Y. S. Ct. 1953).

the fact that "courts are simply not well equipped to decide property interests or rights to possession with regard to land outside their jurisdiction, particularly land located in a foreign nation." *Id.*[13] The two rules work together, "since the local action rule without the real property exception to sovereign immunity would mean that real property disputes involving foreign sovereigns could not be resolved in any court," *id.* at 1522, a result that would obtain if petitioners' contentions are accepted.[14]

4. *A Property Tax Lien is not a "Bootstrapping Device," Nor Does it Provide Jurisdiction Where None Would Otherwise Lie.*

Petitioners and the United States are mistaken in contending that these actions are tantamount to a prohibited pre-judgment attachment. Prior to enactment of the FSIA, there was no mechanism for obtaining personal jurisdiction over a foreign state, resulting in plaintiffs' frequent resort to the discredited practice of seizing and attaching property in order to obtain personal jurisdiction. House Report at 8, 1976 U.S.C.C.A.N. v.

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[13] Petitioners incorrectly assert that lien foreclosures do not implicate the complexities of local property law. The fact that before reaching the local law issues, the court must address the governing treaty law is true of any case involving foreign sovereign property. This does not mean that local law is not relevant to the merits of the dispute. It could just as well be argued that any dispute in real property, such as whether the plaintiff or the foreign sovereign has a right to possession, is "really" about the meaning of a state's particular laws governing property possession.

[14] *See also* S. Sucharitkul, Fifth Report on Jurisdictional Immunities of States and Their Property, 1983 I.L.C. Yearbook 46-48 (noting these same grounds as supporting the immovable property exception to foreign sovereign immunity). *United States v. Fox*, 94 U.S. 315 (1877), cited by the United States, actually supports the City, in that it holds that of necessity, "the disposition of immovable property . . . is exclusively subject to the government within whose jurisdiction the property is situated." *Id.* at 320. This is as true of liens as of any other matter affecting title to property.

5 at 6606. The FSIA prohibited this practice, while at the same time providing a mechanism for personal service on foreign states.[15]

The immovable property exception of § 1605(a)(4) gives the court subject matter jurisdiction over this dispute and § 1610 prevents attachment or execution of the property to satisfy the resulting judgment. It cannot be said, therefore, that this litigation uses "bootstrapping" liens that are, in fact, methods of attachment that would violate the proscription on attachment or execution contained at 28 U.S.C. § 1610. Here, the City has not attached petitioners' property and recognizes that it cannot do so even if it prevails. Applying the reasoning of the United States, any action to establish any interest in property — even one permitted under its interpretation of the immovable property exception — would amount to a seizure, because it would, if successful, encumber or even eliminate the foreign state's property rights.

It is wrong to argue, as the United States does, that if a lien is within the immovable property exception the result would be to create jurisdiction where none would otherwise lie, or permit an end-run around any provision of the FSIA. Pre-judgment liens are created by statute in situations where the local or state legislature has decided that the underlying obligations are so tied to the local governance of property that it is appropriate to enforce them through the creation of property interests in the form of liens. This is the case with property tax liens which, like some of the other liens enumerated dismissively by the United States, arise directly out of the ownership and use of property, or are for payment for specific services rendered to a property.[16]

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[15] Similarly, a year after the FSIA was enacted, *Shaffer v. Heitner*, 433 U.S. at 186, prohibited the analogous practice of attaching unrelated property to obtain personal jurisdiction.

[16] The Vienna Diplomatic and Consular Conventions (Art. 23 & Art. 32, respectively) specifically require that all diplomatic properties (Cont'd)

To the extent that the United States is suggesting that no state or local law can support jurisdiction under § 1605(a)(4), its argument goes too far. Property rights exist by virtue of state and local law. Mischaracterizing the lien as a "self-help measure," the United States suggests that a locality would enact legislation as a pretext to gain jurisdiction over a foreign state. This argument is both far-fetched and untrue. Rather, petitioners seek to escape the operation of provisions of law applicable to all realty in the jurisdiction.

B. UNDER THE RESTRICTIVE THEORY OF FOREIGN SOVEREIGN IMMUNITY CODIFIED BY THE FSIA, A PROPERTY TAX LIEN IS A RIGHT IN IMMOVABLE PROPERTY.

The FSIA was enacted to codify "the so-called 'restrictive' principle of sovereign immunity" as then recognized in international law. *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992); House Report at 7, U.S.C.C.A.N. at 6605. *See also Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-489 (1983); *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d at 1517. International practice recognized a wide range of disputes in real property as giving rise to jurisdiction.

Under the restrictive theory of foreign sovereign immunity, a state is only immune from the jurisdiction of foreign courts "as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure*

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pay taxes that "represent payment for specific services rendered." In fact, the State Department has advised diplomatic missions that they are responsible for fees which relate to services to their property. "Typical examples of such services include utilities, water, sewerage and refuse collection. Such charges are stated separately on the tax bill and must be paid." Diplomatic Note HC-18-93 (JA 187). Yet petitioner India has refused to pay sidewalk and elevator charges, which are charges for specific services, and are included in the liens for which the City seeks a declaration of validity (JA74-75).

gestionis)." *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60 (1993); *Reclamantes*, 735 F.2d at 1520. A foreign sovereign that purchases and holds property abroad accepts from the host country and locality a panoply of protections and benefits in connection with that property ownership and, like any other property owner, takes upon itself a bundle of rights and obligations engendered by that ownership, as defined by local law. By acquiring immovable property, a foreign sovereign is said to enter into the sphere of private law, in which it enjoys no immunity. *See* M. Whiteman, 6 Digest Int'l L. § 22, 638-48 (U.S. Dept. of State 1968) (citing foreign law that applies restrictive theory to real property cases).

Long before the enactment of the FSIA in 1976 a broad immovable property exception had begun to be recognized in international law and practice.[17] As early as 1932, the Harvard Research Project on International Law conducted an exhaustive survey of then-current international practice, noted the general acceptance of the restrictive theory, and concluded that "[w]hen a State acquires immovables it must be deemed to effect such acquisition subject to the law in force at the *situs* of the property."

[17] The United States argues that even the absolute (as distinct from the restrictive) theory of foreign sovereign immunity recognized the immovable property exception, and therefore the United States' adoption of the restrictive theory is irrelevant in determining the scope of that exception. However, some, though not all, of the countries following the absolute theory rejected the immovable property exception as inconsistent with absolute immunity. *See, e.g., Reference re Tax on Foreign Legations*, 2 D.L.R. at 500 (Canada 1943); *Syquia v. Lopez* 1951 I.L.R. 228, 230-31 (No. 55) (S. Ct. of the Philippines 1949) in M. Whiteman, 6 *Digest of Int'l L.* at 644-45; *Robine v. Consul of Great Britain*, 1950 I.L.R. 140, 142-43 (Ct. of App. of Bordeaux, France 1950) in M. Whiteman, 6 *Digest of Int'l L.* at 646. In contrast, the growing number of States that accepted the restrictive view applied a broad immovable property exception, holding that "[b]y acquiring immovable property a foreign State enters into the sphere of private law." *Rep. of Latvia Case*, 1955 I.L.R. 230, 232 (Higher Ct. of App., Fed'l. Rep. of Germany 1955); *see also Claim Against Empire of Iran Case*, 38 I.L.R. 57, 65, 68, 80-81 (Fed'l Cont'l Ct., Fed'l. Rep. of Germany 1963).

Harvard Research in International Law, Draft Convention on the Competence of Courts in Regard to Foreign States, Art. 9, 26 Am. J. Int'l L., Supp. 455 at 574 (1932). The Harvard Draft Convention stated that a local court has jurisdiction over a foreign sovereign "when the proceeding relates to rights or interests in, or to the use of, immovable property." *Id.* at 473-74. *See also* C.C. Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 848 (2d ed. 1945) (the exception includes actions to resolve "questions pertaining to . . . the adverse interests of individual claimants").

By 1962, the Restatement (Second) of the Foreign Relations Law of the United States concluded, at § 68, that "the immunity of a foreign state . . . does not extend to . . . (b) an action to obtain possession of *or establish a property interest in* immovable property located in the territory of the state exercising jurisdiction" (emphasis added). Comment d to § 68 further specifies that

> The immunity from jurisdiction of a foreign state does not extend to actions for the determination of possession of, or an interest in, immovable or real property located in the territory of a state exercising jurisdiction. The rule stated in Clause (b) does not preclude immunity with respect to a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession.[18]

As *Reclamantes*, 735 F.2d at 1521, and the court below correctly concluded (Pet. App. 12, 446 F.3d at 372), both § 68

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[18] The Second Circuit noted, Pet. App. 12-13, 446 F.2d at 372, that "the illustrations to this comment make clear that it does not limit the types of interests that can be involved, but rather clarifies that those rights must actually be 'in issue.'" Among the international decisions relied upon by the Reporters of the Restatement (Second) is *Suit Against Hungary*, 1927-28 I.L.R. 174, 175 (Sup. Ct. Czechoslovakia 1928), in which the court enforced a judgment lien against the Hungarian legation in Prague. *See* Restatement (Second) § 68, rptr. Note 1.

of the Second Restatement and its comment d support the view that an action to declare the validity of a property tax lien is one "to establish a property interest in immovable property."[19]

The Restatement (Third) of the Foreign Relations Law of the United States, adopted in 1986, noted the growing acceptance of the restrictive view of immunity from the end of World War II to the enactment of the FSIA in 1976 and immediately thereafter. *See* House Report at 8-10, 1976 U.S.C.C.A.N. at 6606-08. The Restatement (Third), citing the FSIA, explicitly states that property tax claims are not barred by foreign sovereign immunity:

> Premises used for an embassy, consulate, or other diplomatic mission come under [the exception], so that controversies relating to rights of ownership, possession, occupation, or use, as well as controversies concerning payment of rent, *taxes*, and other fees concerning such premises are subject to adjudication in the local courts.

Restatement (Third) § 455, comment b (emphasis added).[20]

International conventions drafted around the time of the FSIA's adoption, while not binding on the United States, and not identically phrased, offer further evidence of the international practice the FSIA was intended to codify. The European Convention on State Immunity, May 16, 1972, CETS No. 74,

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[19] *See also* Sections 64 and 65 of the Restatement (Second) and comments d and f to § 65 (while foreign government property is immune from tax enforcement, it is not immune from taxation).

[20] Petitioners and the United States argue that the Restatement (Third) is not authoritative. The United States' position here is inconsistent with its own prior position in *City of Englewood*, where it relied on the then-current draft of the Restatement (Third) as supporting application of the immovable property exemption to an action for property taxes. U.S. *City of Englewood amicus* Br. at 10 n. 7. This Court has also cited the Restatement (Third) with approval. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677, 713-714 (2004).

which was drafted in 1972 and entered into force in 1976, just prior to the enactment of the FSIA, shows that by 1972 international practice recognized jurisdiction in the *situs* country over a wide range of disputes concerning rights in immovable property. Article 9 of that Convention states that no immunity is available if the proceedings relate to the foreign sovereign's "rights or interests in, or its use or possession of, immovable property," or "its obligations arising out of" them.[21]

Similarly, the immovable property exception in the United Nations Convention on Jurisdictional Immunities of States and Their Property, 44 I.L.M. 803 (2004), uses the same formulation. Although the U.N. Convention was not approved by the General Assembly until 2004, this provision was in virtually final form in 1983.[22] Both conventions emphasize that "[t]he expressions 'rights', 'use' and 'possession' must be interpreted broadly." *See* Explanatory Report to the European Convention at ¶ 44; I.L.C. Fifth Report at 51. A similar formulation is also found in the United Kingdom's State Immunity Act of 1978, 17 I.L.M. 1123, 1124 (1978) (§ 6[1] provides that "A State is not immune as respects proceedings relating to — [a] any interest of the State in, or its possession or use of, immoveable property in the

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[21] Signatories to that Convention are Austria, Belgium, Cyprus, Germany, Luxembourg, Netherlands, Switzerland, and the U.K. *See* Council of Europe, CETS 74, status, http://conventions.coe.int/Treaty/Commun/ChercheSig.asp.

[22] When the U.N. Convention was approved in 2004, the United States supported it. While it expressed qualifications as to certain other provisions, it expressed no doubts concerning the immovable property exception, which it described as "widely recognized," and having "worked well." Statement by Eric Rosand, Deputy Legal Counselor, U.S. Mission to the United Nations, Oct. 25, 2004 (http://www.usunnewyork.usmission.gov/04_206.htm).

To date, the U.N. Convention has been signed by 28 countries, including India. *See* United Nations, Office of Treaty Affairs, Status of Multilateral Treaties Deposited With the United Nations (2007), http://untreaty.un.org.

United Kingdom; or [b] any obligation of the State arising out of its interest in, or its possession or use of, any such property").[23]

Petitioners' and the United States' suggestion that these conventions should be disregarded because they cover only private disputes is misleading. As stated in the Explanatory Reports, "[t]he exclusion of these matters from the field of application of the [European] Convention . . . means only that, since the provisions of the Convention may not be invoked, recourse must be had to general rules of law," such as the Vienna Conventions, which provide for taxation of the property at issue here. Explanatory Report to European Convention at p. 113-114, http://www.conventions.coe.int/Treaty/en/Treaties/Word/074.doc.

Further indicative of the international practice underlying the FSIA immovable property exception are the pre-FSIA decisions of numerous courts abroad that have exercised jurisdiction to adjudicate obligations similar to those at issue here.[24] Similarly, the Code of Civil Procedure of petitioner India,

[23] The Chairman of the Drafting Committee of the U.N. Convention stated that the issue of taxation was ultimately not addressed because it was "governed by existing rules of international law." 1991 I.L.C. Yearbook 84, ¶ 6. The United States' representative on the I.L.C. Drafting Committee opposed deleting an earlier provision in the Convention that would have provided explicitly for jurisdiction over matters involving taxation of foreign sovereigns, and agreed to the deletion only "provided it was made entirely clear . . . that the deletion did not in any way prejudge the question of State immunity in fiscal matters." Summary Records of the Meeting of the Forty-third Session, 1991 Yearbook of the I.L.C., v. 1, at 84.

[24] *See, e.g., Suit Against Hungary*, 1927-28 I.L.R. 174 at 175 (Czechoslovakia, 1928) (enforcing judgment lien against Hungarian legation in Prague) (cited in Restatement (Second) § 68, rptr. Note 1); *U.S. Government v. Bracale Bicchierai*, 65 I.L.R. 273, 274-75 (Ct. of Appeal of Naples, Italy 1968) (no immunity for action to cancel lease of U.S. Consul); *Hungarian Embassy Case*, 65 I.L.R. 110, 112 (Fed. S. Ct., Fed. Rep. of Ger. 1969) (no immunity, even from execution, in mortgage foreclosure action so long as functioning of diplomatic mission

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adopted in its present form in 1951, allows a private party, with the consent of the Central Government, to sue a foreign sovereign in the Indian courts "with reference to [immovable] property *or for money charged thereon.*" Code of Civ. Proc. § 86, *reproduced in* U.N. Leg. Series, v. VII, Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities (1958) (emphasis added).

As the United States argued in its *City of Englewood amicus* brief, at 10:

> The FSIA intended to codify this international law and practice and should be construed consistently with that law and practice. Accordingly, the [Third Circuit] panel should have interpreted the real property exception of section 1605(a)(4) to include actions for property taxes.

Prior to the enactment of the FSIA, no American court had definitively decided — one way or the other — whether it had jurisdiction to adjudicate immovable property cases brought against a foreign sovereign, because it was not until the enactment of the FSIA that the responsibility for making determinations concerning immunity from suit was transferred from the State Department to the courts (*see infra* at 31).

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not impaired; foreign sovereign's assumption of mortgage obligations held to be private law activities); *Restitution of Property (Rep. of Italy) Case*, 1951 I.L.R. 221, 222 (Ct. of App. of Hamm, Fed. Rep. of Ger. 1951) (immovable property exception supports jurisdiction over foreign state in action by private persons to obtain return of property transferred to state by "discriminatory legislation"); *Purchase of Embassy Staff Residence Case*, 65 I.L.R. 255, 257 (Trib. of First Instance, Athens, Greece 1967) (no immunity from jurisdiction with respect to purchase of real property used for housing U. S. embassy staff below rank of head of mission); *see also Thai-Europe Tapioca Service Ltd. v. Government of Pakistan*, 3 All E.R. 961 (Eng., Ct. of App. Civ. Div. 1975) (outlining exceptions to sovereign immunity, including cases "in respect of debts incurred here for services rendered to" property in forum).

Contrary to the United States' explanation, the two United States cases in which the question of jurisdiction to adjudicate tax issues arose prior to enactment of the FSIA, *City of New Rochelle v. Republic of Ghana*, 255 N.Y.S.2d 178 (N.Y. County Ct. 1964), and *Knockling Corp. v. Kingdom of Afghanistan*, 167 N.Y.S.2d 285 (N.Y. County Ct. 1957), are not cases which rejected suits involving property tax liens "as barred by sovereign immunity." Instead, the courts there acceded to the Department of State's Recognitions of Immunity in the properties, as they were required to do by the then-obtaining judicial doctrine directing acquiescence to such Recognitions. *See United States of Mexico v. Schmuck*, 62 N.E.2d 64 (N.Y. 1944). Indeed, the court in *City of New Rochelle* stated that, but for the requirement that it comply with the State Department's Recognition of Immunity, with which it complied "most reluctantly," it was "of the opinion that it ha[d] jurisdiction of the real property at issue." 225 N.Y.S. 2d at 179. Nor is the pre-FSIA case of *Republic of Argentina v. City of New York*, 250 N.E.2d at 698, instructive on the question of jurisdiction, since that case was instituted by the foreign sovereign.

C. THE CASE LAW INTERPRETING 28 U.S.C. § 1605(a)(4) SUPPORTS A FINDING OF JURISDICTION HERE.

Apart from the decisions below, only *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d at 1517, contains a careful analysis of the parameters of the FSIA's immovable property exception. That decision supports the City's position.

Plaintiffs in *Reclamantes* were Mexican nationals who sued their own government for compensation promised them in a 1941 treaty between Mexico and the United States, which treaty extinguished the claims of claimants' predecessors in interest to real property lost to the United States following the Mexican-American War. The *Reclamantes* court held that because claimants' compensation claims were only derivative of ancient

property claims they were not "rights in immovable property" that were then in issue. 735 F.2d at 1523.

In seeking "to determine what Congress meant by the language [of the immovable property exception]," the court in *Reclamantes*, citing the House Report, wrote (735 F.2d at 1521-22):

> That § 1605(a)(4), like the traditional real property exception it was intended to codify, is limited to disputes directly implicating property interests or rights to possession is consistent with the examples of its application mentioned in the House Report and cited by appellants: suits involving "questions of ownership, rent, servitudes."

"Also consistent" with the House Report, *Reclamantes* said, was *County Board v. German Democratic Republic*, Civil No. 78-293-A, reprinted at 17 I.L.M. 1404 (E.D. Va. Sept. 6, 1978), in which the court found jurisdiction to adjudicate a dispute over property tax liens on diplomatic staff housing, which is exactly the issue before this Court. *Reclamantes*, 735 F.2d at 1522.[25]

The Court also found support for its opinion in both the local action rule and in § 68 of the Restatement (Second), which

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[25] In *County Board*, a county taxing authority in the United States sued a foreign sovereign seeking a declaration that its tax liens on diplomatic staff housing were valid. The District Court found that it had jurisdiction under § 1604(a)(4). After the District Court's decision in *County Board*, the United States filed an action seeking a declaratory judgment that the property was exempt from the county tax, which action did not present any jurisdictional issue under the FSIA. *United States v. County of Arlington*, 669 F.2d 925, 928 (4th Cir. 1982), *cert. denied sub nom. County of Arlington v. United States*, 459 U.S. 801 (1982), *appeal after remand sub nom. United States v. County of Arlington*, 702 F.2d 485 (4th Cir. 1983). The Fourth Circuit there held that the subject tax assessments were invalid. This holding is consistent with the particular rule applicable to diplomatic properties in the District of Columbia metropolitan area only. *See supra* at p. 3 n. 2.

"declined to extend the immunity of a foreign sovereign to 'an action to . . . establish a property interest in immovable property.'" It also cited both comment d to § 68, and the then-current draft of § 455(1)(c) and comment b to that section, in what was to become the Restatement (Third). *Id.* at 1521.

Subsequent decisions have relied exclusively on the analysis of *Reclamantes,* although not always interpreting the decision correctly. In *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d at 31, a case the court below found "unpersuasive," Pet. App. 21 n. 15, 446 F.3d at 376 n. 14, the Third Circuit reiterated *Reclamantes*' statement that "§ 1605(a)(4), like the traditional real property exception it was intended to codify, is limited to disputes directly implicating property interests or rights to possession," and then conclusorily stated: "[N]o one disputes Libya's title to the Englewood premises or its right to exclude others from possession thereof. Thus § 1605(a)(4) does not apply." *City of Englewood*, 773 F.2d at 36. *City of Englewood* undertook no analysis beyond what it borrowed from *Reclamantes*.[26]

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[26] As acknowledged by the United States, the United States filed an *amicus* brief in *City of Englewood* in support of plaintiff's motion to reargue and of the exercise of jurisdiction under the immovable property exception. The United States now incorrectly explains that the United States' brief then "did not examine pre-FSIA practice" and that it was "premised upon the mistaken understanding that the real property exception in the European Convention . . . would permit such claims" (U.S. Br. at 19 n.15). But in its *City of Englewood* brief the United States: argued (at pp. 5 to 7) that a proper reading of § 1605(a)(4), its legislative history and the decision in *Reclamantes* all supported the exercise of jurisdiction; argued (at pp. 8 to 10) that general principles of international law provide an exception from sovereign immunity to actions to assess taxes, including references to the laws of Portugal and Trinidad and Tobago and the draft Inter-American Convention on the Jurisdictional Immunities of States, in addition to the European and draft United Nations Conventions; and argued (at pp. 10 to 14) that "as a matter of property law, disputes which involve tax liens involve rights in immovable property," including citations to New Jersey statutes and

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Other cases interpreting the immovable property exception are consistent with *Reclamantes* and with other law that defines the contours of the exception. *MacArthur Area Citizens Ass'n v. Republic of Peru*, 809 F.2d 918, 921 (D.C. Cir. 1987), while saying that the immovable property exception was "not intended broadly to abrogate immunity for any action touching upon real estate," was a neighborhood association's suit for damages allegedly caused by a diplomat's use of property in violation of a zoning ordinance. Plaintiff there was "obviously not seeking to establish any rights in [the property, nor did it make any] claim to any interest in that property." *Id.* As the court there correctly pointed out, the complaint "sounds not in the law of real property at all, but the law of nuisance." *Id.*

Fagot Rodriguez v. Republic of Costa Rica, 297 F.3d 1 (1st Cir. 2002), is also consistent with *Reclamantes* and with the City's position here. *Fagot Rodriguez* was an action for nonpayment of rent upon real property located in Puerto Rico that was used to house a foreign consulate. Shortly after institution of the suit, which originally sought eviction in addition to back rent and monetary damages for trespass, Costa Rica vacated the premises, and the Court was called upon to determine what had become "a simple contract dispute over nonpayment of rent — without more." 297 F.3d at 12. The proceedings at bar, on the other hand, do not seek money damages arising from an essentially contractual dispute concerning the use of property, but rather the judicial recognition

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case law dating to the 1920s, New York case law, real property, taxation and eminent domain treatises, and the Uniform Commercial Code. The United States concluded in that brief (at p. 3) that "Congress never intended that the principle of sovereign immunity should permit foreign governments to ignore their obligations to state and local communities," and that a denial of jurisdiction "will undermine the efforts of the United States both to ensure that foreign governments do not abuse the privileges and immunities to which they are entitled . . . , and to promote the interests of the United States abroad."

of a lien upon the real property itself, which lien would encumber the property's title.

By contrast, in *York River House v. Pakistan Mission to the U.N.*, 1991 U.S. Dist. LEXIS 13683 (S.D.N.Y. 1991), then - District Judge Leval concluded that the immovable property exception did apply. *York River House* concerned whether, under New York's Rent Stabilization Law, a lessor was entitled to terminate a lease and regain possession of a property leased by Pakistan's Mission to the United Nations. The exception applied, moreover, even though, as in this case, the lessor could not obtain an order of eviction because the occupant enjoyed immunity from execution under the Vienna Convention on Diplomatic Relations. *York River House v. Pakistan Mission*, 820 F. Supp. 760 (S.D.N.Y. 1993).

D. THE OVERALL PURPOSE OF THE FSIA REQUIRES THAT THE ISSUES RAISED BY THESE PROCEEDINGS BE DECIDED BY THE JUDICIARY AND NOT BY THE STATE DEPARTMENT.

In enacting the FSIA, Congress determined that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth" in the statute. 28 U.S.C. § 1602. *See also Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983) ("Congress passed the Foreign Sovereign Immunities Act in order to free the Government from . . . case-by-case diplomatic pressures [and] to clarify the governing standards"). *Kiowa Tribe v. Manufacturing Techs.*, 523 U.S. 751, 760 (1998) noted "difficulties in implementing the principle" of restrictive sovereign immunity "through predominantly diplomatic means." In accordance with this express purpose of Congress in enacting the FSIA, the question of jurisdiction presented here should be decided as a straightforward question of law, and not be subjected to the vagaries of international diplomacy.

The State Department's actions in this case manifest precisely the impact of changeable diplomatic interests and pressures the FSIA was enacted to remove from the jurisdictional determination. As noted, in *City of Englewood*, the United States took the position that litigation concerning the validity of property tax liens comes within the immovable property exception and belongs in the courts. It now takes the opposite view, arguing that this dispute is "appropriately resolved through diplomatic means, rather than litigation in the courts of one state or the other" (U.S. Br. at 24 n.19). In addition, for more than half a century, and certainly since adoption of the Vienna Convention in 1969, the United States has expressed the view that properties like those at issue here are taxable (*see infra* at pp. 32-36).

The United States' views on the statutory interpretation question presented here are not entitled to any special deference. *See Republic of Austria v. Altmann*, 541 U.S. at 691 (United States' views on such statutory construction issues "are of considerable interest to the Court" but "they merit no special deference" in absence of reasons pertaining to a "particular" petitioner); *Baker v. Carr*, 369 U.S. 186, 211 (1962) ("It is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"). *See also, Japan Whaling Assoc. v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986) ("the courts have the authority to construe treaties and executive agreements, and . . . interpreting congressional legislation is a recurring and accepted task for the federal courts").

E. THE VIENNA CONVENTION AND PRACTICE BOTH BEFORE AND AFTER ITS ADOPTION SUPPORT BOTH THE CITY'S CLAIM ON THE MERITS AND A FINDING OF JURISDICTION HERE.

In support of their argument that petitioners enjoy jurisdictional immunity, petitioners and the United States repeatedly cite the Vienna Convention and other authorities that address the merits, *i.e.*, whether staff housing is exempt from taxation. They argue that jurisdiction should not be found because the City's claim allegedly has no merit. They also argue that because the Vienna Convention would allegedly exempt a diplomatic agent from jurisdiction in a case such as this, and because the legislative history supports reading the FSIA "consistently with" the Vienna Convention, the FSIA should also be interpreted as exempting foreign sovereigns from jurisdiction here. These contentions are wrong.

1. The Vienna Convention and Other Pre-FSIA Authorities Show That the Properties At Issue Here Are Taxable.

For over half a century, the United States has repeatedly taken the position that foreign government properties such as those at issue here are subject to local taxation. In 1952, at about the same time as the Tate Letter signaling the United States' adoption of the restrictive view of foreign sovereignty,[27] the State Department advised the City that even cultural diplomatic offices maintained by France were taxable if State law so provided.[28]

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[27] Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-715 (1976).

[28] Letter from the Secretary of State to the City of New York, contained in the Record on Appeal (p. 58) in *Republic of Argentina v. City of New York*, 250 N.E.2d at 698.

In a 1955 Note, the State Department informed foreign governments that "the taxation of real property owned by foreign governments and used for consular purposes in the various states is a local matter . . . ." *Laws and Regulations Regarding Diplomatic and Consular Privileges and Immunities*, U.N. Leg. Series v. VII (1958).[29]

This position was fully consistent with international and United States practice at the time and earlier.[30] Eileen Denza, relied on by the United States here, writes that "prior to the Vienna Convention, state practice on the imposition of national

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[29] Decades earlier, in 1925, a New York State trial court held that the French government had to pay real property taxes on property it owned in Brooklyn. An order to pay taxes, the court reasoned,

> constitutes no interference with the sovereign use of such property . . . The privilege of immunity [of diplomatic agents] carries with it an exemption from taxation of the personalty of an ambassador and the property belonging to him, or . . . his sovereign, and applies to the premises occupied by him as his residence for the purpose of transacting his governmental business, but the exemption to ambassadors or to foreign states does not seem to have been extended beyond such privileges.

Republic of France v. City of New York, 74 N.Y.L.J. 1279, Dec. 30, 1925 (N.Y. Sup. Ct. 1925). The United States' speculation that this decision turned on the fact the property in question was owned by a corporation that was in turn owned by France finds no support in the decision.

[30] *See also Gobierno de Italia v. Consejo Nacional de Educacion*, 1941-1942 Ann. Dig. 196, 198 (Camera Civil de la Capital, Argentina 1940) (tax exemption is a courtesy; no exemption for land taxes); Decree No. 615 of 6 April 1935 to Define the Privileges and Immunities of Foreign Diplomatic Agents (Colombia) (no property tax exemption except for mission property); Rules of the Federal Political Dept. on Diplomatic and Consular Privileges (Switzerland, 1956) (diplomatic immunity from taxation does not extend to real property taxes) (the last two citations *reproduced in* 7 U.N. Legislative Series at 66, 308).

and local taxes on premises of a diplomatic mission was variable, and where exemption from liability was granted, it was based on courtesy, on general usage, or on reciprocity rather than on binding custom." Eileen Denza, *Diplomatic Law: A Commentary on the Vienna Convention on Diplomatic Relations* at 149 (2d ed. 1998). *A fortiori*, staff housing, which is not deemed diplomatic premises, has not been thought to be exempt from local property taxation.[31]

As the City would demonstrate at a hearing on the merits, Article 23 of the Vienna Convention, in force 1972,[32] actually provides for taxation of staff housing, since it exempts from taxation only the "premises of the mission." "Premises of the mission" are defined as the "buildings or parts of buildings . . . used for the purposes of the mission *including the residence of the head of the mission*." 23 U.S.T. 3227, Art. 1(i) (emphasis added). If "premises" had been intended to include staff housing, the convention drafters would not have singled out the residence of the head of mission for tax exemption.[33]

That the foregoing interpretation is correct, and reflects the United States' understanding of the Vienna Convention, is shown by the State Department's consistent post-Vienna Convention

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[31] *Republic of Argentina v. City of New York*, 250 N.E.2d at 698 concerned the tax status of consular offices, and not staff housing. *Id.* at 701.

[32] Article 23 provides: "(1) The sending State and the head of the mission shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the mission, whether owned or leased, other than such as represent payment for specific services rendered."

[33] A United Kingdom court, interpreting this same Vienna Convention language, has held that because staff housing is neither mission premises nor used for mission purposes, it had jurisdiction over a rent dispute between a private landlord and France. *See Intpro Properties (U.K.) Ltd. v. Sauvel*, QB 1019 (Queen's Bench, United

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advice to the diplomatic community and taxing authorities, reviewed *supra* at pp. 1-3, that the Vienna Convention permits local property taxation of staff housing. In fact, the State Department's present website, after explicitly citing the Vienna Convention, advises that diplomatic staff housing is not exempt from local property taxation outside the Washington, D.C. metropolitan area (JA177). The present State Department "FAQ" concerning Real Property, Taxation and Parking is to the same effect.[34]

Thus the argument that petitioners are immune from jurisdiction because they are allegedly immune from taxation is incorrect.[35]

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Kingdom 1983) (citing E. Denza, *Diplomatic Law*). *See also City of Englewood*, 773 F.2d at 31 (*amicus* brief of the United States argued that certain Libyan diplomatic property was subject to taxation and certain liens were valid).

[34] The Ambassador's residence and the residence of the head of a consular post are exempt [from property taxation] on the basis of international law. In addition, subject to reciprocal treatment of comparable property belonging to the U.S., other diplomatic staff residences may also be granted exemption. *Absent bilateral agreement, consular staff and residences are not exempt.*

U.S. Dept. of State, Real Property, Taxation & Parking FAQ, http://www.state.gov/ ofm/resource/30294.htm (emphasis added).

[35] In support of their position on the merits, petitioners also cite *Reference re Tax on Foreign Legations*, 2 D.L.R. 481 (Canada 1943), an opinion on reference from the Government of Canada which raised no jurisdictional question. By a 3 to 2 decision, it declared illegal under Ontario law the then-existing practice whereby localities taxed the legations of various foreign countries. The dissenting judges took the position that the taxes could be imposed even though the resulting liens could not be enforced. *Id.* at 508, 516. Ontario at that time accepted and
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2. *The Vienna Convention Does Not Provide For Jurisdictional Immunity to Diplomatic Agents, Much Less to Foreign Sovereigns, In a Case Concerning Staff Housing.*

Petitioners and the United States argue that Article 31 of the Vienna Convention requires that the FSIA's immovable property exception be interpreted to exclude jurisdiction here. Article 31 provides that a

> diplomatic agent . . . shall enjoy immunity from . . . civil and administrative jurisdiction, except in . . . a real action relating to private immovable property . . . , unless he holds it on behalf of the sending State for the purposes of the mission.[36]

This provision allegedly immunizes foreign sovereigns from jurisdiction because (1) this is not "a real action;" (2) staff housing owned by a diplomatic agent would be immune from jurisdiction under this provision; and (3) it therefore follows that such housing, when held by the foreign sovereign itself, must also be immune from jurisdiction. They are wrong on each of these points.[37]

(Cont'd)

adopted the law of England as its own, *id.* at 484, 501, and England at that time followed the most absolute principle of foreign sovereign immunity, *id.* at 512 (dissent of Hudson, J.) ("in England the widest views as to diplomatic immunity are adopted"). Therefore, this decision is no longer authoritative, even in Canada, and cannot bear on the interpretation of the FSIA, which codified the restrictive view of foreign sovereign immunity. *See* Fifth I.L.C. Report at 48-49, ¶¶ 118-123 (noting shift in England from strict, absolute view of foreign sovereign immunity to restrictive view).

[36] Articles 34 and 37, also cited by petitioners, add nothing to the analysis. Article 34 exempts the diplomatic agent from taxes under the same circumstances as described in Article 31. Article 37 extends some or all of the immunities previously described to various categories of diplomatic staff and their families.

[37] Contrary to the assertions of petitioners and the United States, (Cont'd)

First, this is a real action within the meaning of Art. 31. The concept of real action in its contemporary use comes from civil law. Under Louisiana law, for example, a real action is the equivalent of a local action that must be brought where the property is located. *Weeks, Kavanaugh & Rendeiro v. Blake*, 2001 U.S. Dist. LEXIS 10386, at 12 (E.D. La. July 17, 2001) ("real actions" are actions involving enforcement of rights in real property. "[A]n action for enforcement . . . of a mortgage clearly is a real action, which is entirely local, not transitory, in nature."); *Chateau Lafayette Apts, Inc. v. Meadow Brook Nat'l Bank*, 416 F.2d 301, 304 (5th Cir. 1969). *See also* E. Denza, *Diplomatic Law* at 238 (real action is one in which title or possession is in issue).

Second, staff housing is not covered by Article 31. That article only denies jurisdiction in a "real action relating to private immovable property" in one limited instance: when the diplomatic agent holds the property for use as a diplomatic mission because local law prohibits foreign sovereigns from owning property in their own names. In that instance, which is not the case here, the nominal owner of the legation property has to be the diplomatic agent rather than the foreign nation itself. 1957 I.L.C. Yearbook 94-95 (402nd Meeting, May 22, 1957); *see also* Denza, *Diplomatic Law* at 243 (provision covers cases where mission premises as a matter of form and in accordance with local law were held in the name of the head of mission).[38]

(Cont'd)

United States courts have found that they had jurisdiction in tax cases against foreign sovereigns, both before and after enactment of the FSIA. *See City of New Rochelle*, 255 N.Y.S. 2d at 178, *County Bd. of Arlington*, 17 I.L.M. 1404. In 1985, the United States urged this position – diametrically opposed to its present position – on the Third Circuit in its *amicus* brief in support of reargument in *City of Englewood*, 773 F.2d 31.

[38] *See Deputy Registrar Case*, 94 I.L.R. 308, 312 (District Court of the Hague, The Netherlands 1980) (under Vienna Convention Art.

(Cont'd)

Third, the jurisdictional immunities applicable to diplomatic agents under the Vienna Convention are different from those applicable to foreign sovereigns under the FSIA. *See* S. Sucharitkul, *Immunities of Foreign States Before National Authorities*, 97, in 1976 Recueil des Cours (Collected Courses of the Hague Academy of International Law, 1976) ("immunities of ambassadors are regulated by a different set of principles of international law from that applicable to State immunity"). Indeed, the Vienna Convention, while guaranteeing jurisdictional immunities for diplomatic agents, provides, with respect to foreign sovereigns, only that "the premises of the mission . . . shall be immune from . . . attachment or execution" (Vienna Convention, Art. 23[3]).

Accepting the argument of petitioners and the United States that Article 31 of the Vienna Convention should be imported into the FSIA would deprive local courts of jurisdiction even over a dispute that alleged that title was in the claimant rather than in the foreign sovereign. Moreover, there would be no FSIA jurisdiction to entertain a suit against a foreign sovereign by a contractor who had done work on an embassy building and who was not paid. Yet such a suit is expressly mentioned by the House Report as allowable under the commercial activity exception. H.R. Rep. No. 94-1487, at 16 (1976), 1976 U.S.C.C.A.N., v. 5, at 6615.[39]

(Cont'd)
31(1)(a), jurisdictional immunity does not apply to staff housing, but only to situation in which "the sending State [must] acquire the immovable property required for the mission in the name of the head of the mission"); *see also Intpro Properties (U.K.) Ltd. v. Sauvel*, QB 1019 (United Kingdom 1983) (interpreting Vienna Convention and finding no jurisdictional immunity for staff housing owned by France).

[39] A suit brought under these very facts was also allowed by the Federal Constitutional Court of Germany, which explicitly rejected the argument that Article 31 of the Vienna Convention, which applies to diplomatic agents, could be applied *pari passu* to foreign sovereigns. *Claim against the Empire of Iran Case*, 38 I.L.R. at 57 (Germany, 1963) (noting that "the extent of State immunity cannot be determined from that of diplomatic immunity").

The Vienna Convention does not directly address the jurisdictional immunity of foreign states for claims concerning immovable property. However, the inclusion of a specific provision that prohibits the attachment or execution of mission premises (Vienna Convention Art. 22[3]) strongly suggests that local jurisdiction would apply even to actions concerning rights in such property.[40] The FSIA immovable property exception is consistent with the Vienna Convention on this point, as stated in the House Report:

> It does not matter whether a particular piece of property is used for commercial or public purposes. It is maintainable that the exception mentioned in the "Tate Letter" with respect to diplomatic and consular property is limited to questions of attachment and execution and does not apply to an adjudication of rights in that property.

H.R. Rep. No. 94-1487, at 20, 1976 U.S.C.C.A.N., v. 5, at 6619. Thus, even if petitioners were correct that the portions of their property at issue here qualified as mission premises — and they are not — that fact alone could not control the jurisdictional analysis under the FSIA.

F. A DECLARATION OF THE VALIDITY OF THE TAX LIENS HAS MAJOR PRACTICAL SIGNIFICANCE.

As noted, and contrary to petitioners' repeated assertions, this declaratory judgment action is not an action to "enforce" a

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[40] Interpreting the Vienna Convention, courts of other nations have held that there is no immunity even for claims concerning mission premises as long as they stop short of attachment or execution. *See Jurisdiction Over Yugoslav Military Mission (Germany) Case*, 38 I.L.R. 162, 165-170 (Fed. Const'l Ct., Fed. Rep. of Ger. 1962) (Vienna Convention provides limited immunity to diplomatic mission premises; court may exercise jurisdiction over title dispute concerning diplomatic mission itself, but execution is prohibited); E. Denza, *Diplomatic Law* at 129.

tax lien or to "compel the payment of a tax."[41] Petitioners and the United States argue that Congress could not have intended to grant the courts jurisdiction to consider the City's claim because §§ 1609 and 1610 of the FSIA prohibit enforcement of any judgment that may be rendered here, so that any resulting judgment would be meaningless. But the very structure of the FSIA, which creates broader jurisdiction to adjudicate than to enforce, *Connecticut Bank of Commerce v. The Republic of Congo*, 309 F.3d 240, 256 (5th Cir. 2002); *De Letelier v. The Republic of Chile*, 748 F.2d 790, 798-99 (2d Cir. 1984), contemplates that judgments may be rendered that are not enforceable.

In fact, the FSIA contains no immovable property exception to immunity from enforcement, *see* 28 U.S.C. § 1610, so that any adjudication under the immovable property exception will necessarily be unenforceable, no matter how directly it concerns title, ownership, or possession. Therefore, if the question of whether a claim puts in issue a right in property turned on the enforceability of that very right against a foreign sovereign, the immovable property exception would be rendered a nullity. This is, however, not the case. *See, e.g., York River House v. Pakistan Mission to the U.N.*, 1991 U.S. Dist. LEXIS at 13683; *York River House v. Pakistan Mission*, 820 F. Supp. at 760 (§ 1605(a)(4) jurisdiction accorded over action to terminate the lease of United Nations mission although Vienna Convention prevented eviction).

It is commonplace in international law to distinguish between adjudication and enforcement. *See* Restatement (Third) §§ 401 (distinguishing jurisdiction to adjudicate from

[41] Therefore, petitioners' assertion that the U.S.'s *amicus* brief in *Republic of Argentina*, 25 N.Y.2d 252, stated that a host government could not "compel the payment of a tax" through a judicial proceeding against a foreign sovereign's property is irrelevant (Pet. Br. at 31). Moreover, the quote actually comes from the decision itself, *see Republic of Argentina*, 25 N.Y.2d at 262, and is not to be found in the U.S.'s *amicus* brief.

jurisdiction to enforce), 431 (jurisdiction to enforce), 463 (jurisdiction to enforce and foreign sovereign immunity). This is by no means futile, because it is presumed that a foreign state will honor its obligation to pay a judgment. *See* Testimony of Bruno A. Ristau, Chief, Foreign Litigation Section, Civil Division, Department of Justice, in support of legislation that became the FSIA, before the House Committee on the Judiciary, Subcommittee on Claims and Governmental Relations, Hearing on H.R. 3493 (June 7, 1973), at 24; *Connecticut Bank of Commerce v. The Republic of Congo*, 309 F.3d at 252. *See also* S. Sucharitkul, *Immunities of Foreign States before National Authorities* at 121 (to argue that judgments without implementation are meaningless is to disregard the moral authority attaching to a decision rendered by an impartial tribunal). Moreover, as the United States concedes, in "the United States' experience, when taxes are assessed against properties that are indisputably subject to taxation, foreign governments generally pay those taxes" (U.S. Br. at 24 n. 19). What these cases seek is to make clear that the petitioners' properties are, in fact, "indisputably subject to taxation."

The inability to execute immediately upon a judgment here does not make determination of the City's rights in the immovable property a futile or meaningless exercise. Not only do foreign sovereigns generally pay court judgments, as well as validly assessed taxes, but even if a foreign sovereign were to disregard the lawful judgment of a United States court, a judgment declaring the lien's validity could nevertheless be enforced against a subsequent purchaser. *See United States v. Alabama*, 313 U.S. at 281-82 (declaring validity of tax liens on property owned by United States).

Moreover, Congress has acted to make it likely that a judgment in this case would be paid by any country that receives United States foreign aid. By statute, a judgment declaring the validity of the lien would result in the withholding from foreign aid of 110 percent of the unpaid taxes "as determined in a court order or judgment entered against such country by a court of

the United States." Consolidated Appropriations Act of 2005, Public Law 108-447, § 543(1) (2004); Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2006, P.L. No. 109-102, § 543 (2006). As the Court of Appeals, referring to these Congressional Acts, noted, finding no jurisdiction to determine the validity of property tax liens and the underlying tax liability of foreign governments is "difficult to square with Congress's explicit reliance on the courts to adjudicate" those liabilities. Pet. App. 11, 446 F.3d at 371.

The statutory construction urged by petitioners would render these enactments ineffectual. *See Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *affd. sub nom. Reagan v. Abourezk*, 484 U.S. 1 (1987); 2A N. Singer, Sutherland Statutory Construction § 46.06 (4th ed. 1984). Wherever possible, Congressional enactments should be harmonized and reconciled. *Clark v. Uebersee Finanz-Korporation, A. G.*, 332 U.S. 480 (1947); *Pittsburgh & L. E. R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490, 510 (1989). In presuming harmony between enactments, "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, . . . such views are entitled to significant weight." *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980).

II. THE FSIA'S COMMERCIAL ACTIVITY EXCEPTION PROVIDES AN ADDITIONAL BASIS FOR JURISDICTION.

28 U.S.C. § 1605(a)(2) exempts from foreign sovereign immunity those actions that are "based upon a commercial activity carried on in the United States by the foreign state." Although the courts below did not address this jurisdictional provision, at every stage the City has argued it is applicable here. The exception provides an additional jurisdictional basis for this suit.

28 U.S.C. § 1603(d) explains that "[t]he commercial character of an activity shall be determined by reference to the

nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." Activities undertaken by foreign governments in the United States, including the use of real property, therefore may afford the basis for suit in American courts if they are the same sorts of activities in which private actors might engage, when the foreign government, regardless of its purpose, "acts, not as regulator of a market, but in the manner of a private player within it." *Republic of Argentina v. Weltover*, 504 U.S. at 614. *See also Alfred Dunhill of London, Inc. v. Republic of Cuba,* 425 U.S. at 698-705; *Saudi Arabia v. Nelson*, 507 U.S. at 360.

The House Report on the FSIA explains that "the sovereign immunity of foreign states should be 'restricted' to cases involving acts of a foreign state which are sovereign or governmental in nature," and not extend to every act that serves a governmental objective. House Report at 14, 1976 U.S.C.C.A.N. at 6613. A state engages in "commercial activity" "where it exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns,' such as regulation, legislation, expulsion of an alien, control over national resources or denial of justice." *Saudi Arabia v. Nelson*, 507 U.S. at 360.

Courts have routinely exercised jurisdiction over the activities of diplomatic and consular missions where, as here, the activities are of the type in which private commercial actors engage. *See, e.g., Birch Shipping Corp. v. Embassy of United Republic of Tanzania*, 507 F. Supp. 311, 312 (D.D.C. 1980) (holding embassy bank account used for "'maintenance and support of the Embassy and its personnel'" to have been "used for a commercial activity," within the meaning of the FSIA). *See also* House Report at 14, citing a foreign government's "leasing of its property" as an example of a commercial activity that would fall within the statutory definition.

Closely on point is *Joseph v. Office of the Consulate*, 830 F.2d 1018 (9th Cir. 1987), *cert. denied sub nom. Consulate*

General v. Joseph, 485 U.S. 905 (1988), where the Ninth Circuit held that a consulate's rental of a residence for its employees was a commercial transaction that afforded jurisdiction in a landlord-tenant dispute, "although the lease agreement at issue was not undertaken by the Consulate for profit." *Id.* at 1024.

Providing staff housing to petitioners' employees presents the same kind of commercial activity as *Joseph*. Both involve the providing of residences for consular or mission employees. Neither the selection of the housing nor the terms and conditions of employment, nor the perquisites of an employee's position, are issues of relevance in these actions. Petitioners' provision of housing to employees is not an activity that only a sovereign state can perform; rather, it is an activity that business corporations and private not-for-profit organizations can, and frequently do, undertake.[42]

Even if petitioners' decisions to house staff within buildings that also house the mission offices, rather than to rent space for their employees in the private housing market, were motivated by safety considerations or the need to address diplomatic inquiries twenty-four hours a day, *see* JA at 153, rather than just economic concerns, that fact would not change the nature of the activity. Instead, such concerns pertain only to the underlying purpose that has been repeatedly held irrelevant to the jurisdictional question. *Butters v. Vance Int'l, Inc.*, 225 F.3d 462 (4th Cir. 2000), cited by petitioners, is not to the contrary,

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[42] Logging companies and oil drilling companies, for example, also house their employees on site. The Internal Revenue Code devotes an entire section to the tax treatment of housing provided by organizations to their employees. *See* 26 U.S.C. §119(a)(2). *See, e.g., Rowan v. United States*, 452 U.S. 247 (1981) (lodging provided to employees working on offshore oil rigs); *Adams v. United States*, 585 F.2d 1060 (Ct. Cl. 1978) (housing provided by Tokyo-based corporation to American, foreign-based employees). Petitioners' activities are also similar to those undertaken by private landlords who provide housing in exchange for value, rent, or services rendered.

since that case concerned instead "a foreign state's exercise of the power of its police, [which] has long been understood . . . as peculiarly sovereign in nature." *Id.* at 464.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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